IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

KAREN ARMSTRONG,	:	
	:	
Plaintiff,	:	
	:	Civil Action No.
vs.	:	4:13-CV-00050-HLM
	:	
FLOYD COUNTY, GEORGIA, et al.,	:	
	:	
Defendants	:	

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS CITY OF ROME, GEORGIA, ROME-FLOYD PARKS AND RECREATION AUTHORITY, RICHARD GARLAND, AND CHRIS ARRINGTON'S MOTION TO DISMISS PLAINTIFF'S THIRD AMENDED COMPLAINT

COMES NOW the Plaintiff, Karen Armstrong ("Plaintiff" or "Armstrong") and files this *Plaintiff's Brief in Opposition to Defendants City of Rome, Georgia, Rome-Floyd Parks and Recreation Authority, Richard Garland, and Chris Arrington's Motion to Dismiss Plaintiff's Third Amended Complaint*, as follows:

I. INTRODUCTION

The instant Motion represents a premature—and strategically disastrous—attempt by these Defendants to resolve this case's dispositive factual issues without full and complete discovery. In the instant Motion, Defendants have dug themselves into a hole from which they will be unable to emerge: they have committed themselves to the dubious theory that the "probable cause" for

Armstrong's arrest and prosecution was the mere fact that she disobeyed her employer's instructions with respect to how to process parent funds for expenses related to gymnastics competition. Plaintiff's theory of the case has been, all along, that Armstrong's arrest, at the urging of Garland, was an improper attempt to escalate a matter of employee discipline to the criminal sphere. The instant Motion confirms that theory. Although Garland ***knew*** that Armstrong had used for its intended and proper purpose the money given her by parents for gymnastics expenses, he nonetheless sought her criminal prosecution because he was angry that she had disobeyed his instructions for how to process those funds.

This Court has previously ruled that the allegations in Plaintiff's complaint, if proven, would demonstrate a want of probable cause—in addition to actual malice—for Armstrong's arrest. These allegations include that, at the time of her arrest, there was no evidence that she had misappropriated any funds given to her by parents for the purpose of paying their daughters' gymnastics expenses. Moreover, it is alleged that Garland intentionally manipulated the investigation by making it appear that Armstrong had not accounted for funds for which she had, in fact, accounted. Defendants' novel legal theory—that the crime of theft may be derived from Armstrong's mere disobedience of her employer's instructions for the handling of those properly used, fully accounted-for funds—does nothing to alter this Court's previous rulings. As Detective Arrington testified, Armstrong was not arrested for stealing money, she was arrested for "not doing like she was told." (Criminal Transcript ("Cr. Tr.") [Doc. 91, Exhibit B] at 432:5). Defendants now ask this Court to place a stamp of approval of their decision to prosecute Armstrong for what was, in fact, no crime at all: the disobedience of her supervisor-in-employment's instructions.

II. STATEMENT OF FACTS

By now, the factual allegations of this case are well known to the Court. Plaintiff hereby incorporates, by reference, the Statement of Facts as outlined in Plaintiff's Third Amended Complaint (Doc. 76), which incorporated the facts as outlined in Plaintiff's Second Amended Complaint (Doc. 29), as well as the facts as recited by this Court in its' May 10, 2013 Order (Doc. 28 at 7-18).

III. LEGAL ARGUMENT AND CITATION TO AUTHORITY

A. This Court has previously ruled upon Defendants' argument that Plaintiff's Complaint is merely conclusory.

As Defendants admit in their brief, this Court has already plainly ruled "the Complaint and Amended Complaint do not consist of legal conclusions or conclusory allegations" (Defendants' Brief [Doc. 92] at 14, *quoting* the May 10, 2013 Order [Doc. 28] at 21 n.2). As Plaintiff's Third Amended Complaint incorporates her Second Amended Complaint, which contained essentially the same factual allegations as the Original and First Amended Complaints, and as this Court has already rejected these Defendants' arguments concerning alleged "legal conclusions or conclusory allegations," Plaintiff requests that this Court reject those arguments on the grounds previously ruled upon.

B. Armstrong's Chapter 7 Bankruptcy petition, which was filed and discharged before any of the claims presently before the court arose, does not deprive her of standing to bring these claims.

Defendants, invoking § 554 of the Bankruptcy Code, argue that Armstrong lacks standing to bring some of her instant claims because she filed bankruptcy prior to the filing of this case. Defendants do not specify which claims allegedly arose before or during the pendency of the bankruptcy action. None of them did.

Claims that have not yet accrued at the time of the filing of the Chapter 7 bankruptcy petition do not become property of the estate. "Pre-petition causes of action are part of the bankruptcy estate and post-petition causes of action are not." In re Witko, 374 F.3d 1040, 1042 (11th Cir.2004). In Witko, for example, the debtor filed a petition for voluntary bankruptcy on September 8, 1999. Some four months later, a state court denied an alimony request in a wholly unrelated pending divorce action. The debtor thereafter sued his divorce attorney for malpractice. The Eleventh Circuit held that the malpractice action was not property of the estate, despite being related to some pre-petition conduct, because an essential element of the malpractice claim was an adverse outcome to the client caused by the attorney's negligence. Witko's alimony action concluded some four months *after* he filed his Chapter 7 petition, therefore, "Witko's legal malpractice cause of action did not exist until his alimony action concluded with an adverse outcome that was proximately caused by his attorney's negligence". Witko, 374 F.3d at 1043-44.

Similarly, each of Armstrong's federal § 1983 and state law malicious prosecution claims (Counts III, IV, VIII, and IX) are unaffected by her February 8, 2011 Chapter 7 Bankruptcy filing. A § 1983 cause of action for malicious prosecution does not accrue until the criminal charges are dropped or the arrestee is acquitted. Carroll v. Henry Cnty., Ga., 336 B.R. 578, 584-85 (N.D. Ga. 2006)(*citing* Heck v. Humphrey, 512 U.S. 477, 489-90, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994)). Plaintiff was not acquitted of the charges until March 24, 2012. (Plaintiff's Second Amended Complaint at 42). This was long after she had filed for bankruptcy, and after the bankruptcy had been discharged on May 19, 2011. Therefore, because her right to bring her federal and state causes of action relating to malicious prosecution did not arise until after her bankruptcy was discharged, there is no estoppel as to those claims. See Carroll, *supra* 336 B.R. at 584-85 (plaintiff's § 1983 and state law malicious prosecution and false arrest claims were not property of the bankruptcy estate, as the plaintiff's acquittal occurred after the filing of his chapter 7 petition for bankruptcy protection, despite the fact that many of the facts complained of occurred pre-petition).

Plaintiff's remaining claims—intentional infliction of emotional distress (Count V), liability under O.C.G.A. § 36-33-4 (Counts VI and X), and punitive Damages (Counts VII and XI)—are inextricably intertwined with her malicious prosecution claims. Each of these claims relies upon the factual predicate that Armstrong was acquitted of the charges for which she was prosecuted; therefore, she could not have brought them until she was acquitted, which occurred after her bankruptcy petition was filed and discharged. See Carroll, supra, 336 B.R. at 584-85; Witko, *supra* 374 F.3d at 1043-44.

The authority cited by Defendants all involve cases wherein the Plaintiff's cause of action arose before or during the pendency of a bankruptcy estate. See, e.g. Parker v. Wendy's Int'l, Inc., 365 F.3d 1268, 1272 (11th Cir. 2004) (Title VII discrimination suit brought in January 1999, Chapter 7 bankruptcy petition filed two years later in 2001); Barger v. City of Cartersville, Ga., 348 F.3d 1289 (11th Cir. 2003) (suit was filed on July 18, 2001, and bankruptcy was filed nearly two months later on September 4, 2001). Therefore, they are inapposite.

C. Each of Plaintiff's counts, as pled, state a claim for which relief may be granted.

1. Plaintiff has alleged that Detective Arrington's acts were undertaken with malice as she has alleged a want of probable cause

Defendants argue that Plaintiff has failed to allege the element of malice in both her state law and § 1983 malicious prosecution counts (Counts VIII and IX, respectively). This contention is simply untrue. In a malicious prosecution claim, malice includes the want of probable cause, even though no actual malevolence or corrupt design is shown. Ware v. United States, 971 F. Supp. 1442, 1468 (M.D. Fla. 1997) (emphasis supplied). Malice and probable cause, in a malicious prosecution claim, are, therefore, closely linked, if not synonymous. Armstrong's Third Amended Complaint alleges specific facts to substantiate the conclusion that Arrington acted without probable cause, which is legal malice:

- Arrington failed or refused to conduct a full and thorough investigation of the allegations against Plaintiff. (See Plaintiff's Third Amended Complaint at ¶ 71).
- Arrington arrested Armstrong for theft by taking despite the lack of any evidence that Armstrong had converted any property not her own, to her own personal use, or to an improper use, or with an intention to deprive the property owner of said property. (Id. at ¶ 74).
- Arrington arrested Armstrong essentially for insubordination in her employment, which is not a crime. When asked at trial why he arrested Armstrong, Arrington stated that Armstrong's crime was "accepting payment from the parents and not doing like she was told . . . and turn it over to the Recreation Department." The activity described by Arrington as a "crime," is in fact not a crime at all. (Id. at ¶ 75).

As discussed more fully hereinbelow, Plaintiff has pled facts sufficient to show that Detective Arrington lacked probable cause to believe that Armstrong had appropriated or converted, to her own use, any funds; yet, at the urging of Garland, arrested Armstrong for violating workplace rules. Detective Arrington's rather shocking testimony at trial was that he arrested Plaintiff for theft by taking for "not doing like she was told" by her supervisor, despite any evidence that she had stolen any money whatsoever. This fact, particularly when more fully fleshed out at the civil trial, will lead a reasonable jury to determine that he acted with a want of probable cause to believe that Armstrong had committed a crime.

2. Probable cause did not exist for Armstrong's arrest and prosecution

"It is well settled that in an action to recover damages for malicious prosecution where…the evidence is in dispute, the existence or non-existence of malice and want of probable cause are questions of fact for the jury. Kingsland v. City of Miami, 382 F.3d 1220, 1235 (11th Cir. 2004)(internal quotations omitted); See also Willis v. Brassell, 220 Ga. App. 348, 353, 469 S.E.2d 733, 739 (1996). ("Unless the facts regarding probable cause are undisputed, it is a question for the jury."). Here, the facts regarding probable cause are either (a) in dispute, or (b) so clearly in Plaintiff's favor that she is entitled to judgment as a matter of law. A review of the law regarding the elements of theft by taking and its related offenses, in light of the trial transcript, makes clear that no reasonable officer could have believed Armstrong committed the crime for which she was prosecuted. Indeed, Detective Arrington and Plaintiff's own testimony at her criminal trial make that clear. Finally, the denial of Plaintiff's directed verdict at her trial is not preclusive against Plaintiff on the issue of probable cause in these particular circumstances

a. *The testimony at trial does not show that probable cause existed for Armstrong's arrest and prosecution*

Plaintiff was charged with the offense of Theft by Taking. "A person commits the offense of theft by taking when he unlawfully takes or, being in lawful possession thereof, unlawfully appropriates any property of another with the intention of depriving him of the property, regardless of the manner in which the property is taken or appropriated." O.C.G.A. § 16-8-2 (emphasis supplied). As Defendants note, while Armstrong was indicted for Theft by Taking, the criminal offense most closely analogous to the offense alleged against Plaintiff is Theft by Conversion. See Defendant's Brief at p.20. Georgia's Theft By Conversion statute provides: "a person commits the offense of theft by conversion when, having lawfully obtained funds or other property of another . . . under an agreement or other known legal obligation to make a specified application of such funds or a specified disposition of such property, he knowingly converts the funds or property **to his own use** in violation of the agreement or legal obligation." O.C.G.A. § 16-8-4(a)(emphasis supplied).

Regardless of the particular theft offense under which her arrest is examined, Defendants' argument that they had probable cause to believe Plaintiff had committed the offenses of theft by taking or conversion is premised on at least two incredibly flawed premises. First, Defendants wrongly contend that the funds "converted" ***belonged to RFPRA***, and not to the parents who gave Armstrong those funds for the specific purpose of paying meet fees and buying gymnastics supplies for their daughters. Second, Defendants cannot show that Plaintiff did not properly apply those funds to the purpose for which they were collected, because in fact, she did, and all evidence indicated that she had. Third, there has been *zero* evidence that Plaintiff converted any funds for her own use, or for any use other than the gymnastics-related expenses for which the parents entrusted them to her. The mere fact that Armstrong processed the funds through her personal account—for the sake of efficiency, and as she had done for years with her prior employer—as opposed to an RFPRA-sanctioned account, does not amount to theft, or to any crime whatsoever, notwithstanding that she did so in contravention of her employer's instructions.

The testimony at trial makes clear that the funds that Armstrong was processing through her personal account were parent funds, not RFPRA funds;

therefore, she did not deprive, even temporarily, RFPRA of anything that belonged to it. The funds in question were entrusted to Armstrong by the parents for the specific purpose of paying expenses for gymnastics competition. As testified to at trial, these funds were not revenue to RFPRA; rather, they were "in an out" funds that went into an account, and then right back out to gymnastic equipment vendors and facilities where meets were to be held. See Defendant's Brief at p. 9, *citing* Cr. Tr. at 538:1-4 ("Meet fees are not revenue for RFPRA. They should not make money on meet fees. It should be going in and going out."); Cr. Tr. 481:25-482:5 ("…the **team meet account is the parent's money**. The parents put the money in the team account…But…it's just money in, money out. If money is coming into this meet account, money should be going out of that account."); Plaintiff's Third Amended Complaint at ¶ 69; Plaintiff's Second Amended Complaint at ¶¶ 19-23. Defendants' theory of probable cause rests on the incorrect premise that RFPRA was the owner of these funds, and that Armstrong was "depriving" RFPRA of those funds by processing them through her personal account. Because their probable cause theory rests on this rotten foundation, they are not entitled to dismissal, and are almost certainly liable for their arrest and prosecution of Armstrong.

Detective Arrington's testimony at trial further illuminates this fact. When cross-examined on the issue of whether his investigation showed that Armstrong in fact used the funds entrusted to her by parents for the purpose for which she was entrusted them, and no other, he conceded that, in fact, she had properly used the funds, and had not appropriated them to her own use:

> Q: Any monies…these people paid…to Karen Armstrong [was] to make sure their kids participated in these meets, correct?
>
> A: That was their impression when they paid the money.
>
> Q: And all of these participants, in fact, got to compete in those meets?
>
> A: That's my understanding.
>
> Q: So the meet money was in fact paid?
>
> A: To Karen and then to –
>
> Q: Yeah.
>
> A: --later, after she turned the money in.
>
> **Q: So that's – that's – obviously, that's not personal use, correct?**
>
> **A: Correct.**

Cr. Tr. at 430:8-21.

To the extent any additional evidentiary support is needed to prove the fact that Defendants lacked evidence that Plaintiff converted any funds to her own use, or to any use other than that for which she was entrusted, Plaintiff's own trial testimony provides as much. See Cr. Tr. at 545: 6-12. ("…my intentions were not to deprive anybody of anything. But only to get those kids to the meets…”); Cr. Tr. 494:3-6. (“Q. … Now did you have discussions with your parents about forming this particular arrangement that you would receive their money and then go and meet these expenses? ... A. Absolutely.”).

Arrington further admitted that his arrest of Armstrong was not based on evidence that she had stolen money, but because she had violated her employer’s instructions, to wit:

> Q: Going back to Defense 10. This check is made out to Ultimate Gymnastic for Flip City Aerials for $1035…That wasn’t for personal use, was it?
>
> A: That one isn’t.
>
> Q: The checks made out to West Georgia Gymnastics….That wasn’t personal use, was it?
>
> A: Doesn’t appear to be.
>
> Q: Georgia All Star Gym…?
>
> A: …it doesn’t appear to be, sir.
>
> Q: If monies were paid out to Haley Murray for….meet fee registrations, that wouldn’t be for personal use, would it?
>
> A: Probably not.
>
> Q: So over $5700 was paid…in meet related expenses. That wouldn’t be personal, would it?
>
> A: Can’t argue with that.
>
> Q: You know that leotards, gym bags, and fund-raisers are not within Rome Recreation Departments authority anyway, correct?

> A: I have heard testimony about that.
>
> Q: And the fact that Rome Recreation Department has no authority…That didn't factor into your decision…?
>
> A: What factored into my decision was that she had that amount of money that she hadn't turned in when she was suppose to.

Cr. Tr. at 427:20-429:6(emphasis supplied).

Georgia law makes clear the impropriety of using the criminal theft laws to punish someone for breach of a private duty or agreement. Georgia's criminal theft statutes are "intended ***to punish fraudulent conversion, not breach of contract***, and in order to avoid the constitutional prohibition against imprisonment for debt the State ***must prove fraudulent intent.***" Scarber v. State, 211 Ga.App. 260, 439 S.E.2d 83 (1993) (emphasis added). See also Baker v. State, 143 Ga.App. 302, 303(2), 238 S.E.2d 241 (1977) ("It is the presence of a fraudulent intent '... that distinguishes theft by conversion from a simple breach of contract.' [Cit.]"); Barrett v. State, 207 Ga. App. 370, 427 S.E.2d 845, 846 (1993)("…to allow criminal intent to be inferred from nothing more than the fact of [a] breach [of an agreement] would undermine the crucial distinction between fraudulent conversion and breach of contract…and would possibly render this criminal statute unconstitutional."). Here, quite obviously, where was no evidence that Armstrong had expended the funds entrusted to her for anything other than their intended and proper use, there was a complete lack of evidence of fraudulent intent from the very start.

Defendants dig their own hole a little bit deeper by contending not only that Armstrong's workplace insubordination alone was probable cause to prosecute, but also that her lack of criminal intent was irrelevant. Defendants state, "[i]t does not matter if Plaintiff had 'good' intentions for the use of the money," claiming that her 'intent' was ***to circumvent RFPRA policy***..." Defendant's Brief at p.23 (emphasis added). Thus, Defendant's have wedded themselves to the notion that an intent to violate her employer's policy, even if not criminal or fraudulent intent, was enough to justify an arrest and prosecution for theft. Even assuming her intent was to "circumvent RFPRA policy," that does not mean she committed a crime.

An individual's admission that he has breached his agreement with an aggrieved party, with respect to disposition of property, does not, without more, equate to intent to commit theft. In Barrett, 207 Ga. App. at 427, for example, the Court held that a man who had rented equipment and then not returned it, without evidence of fraudulent intent, could not be convicted of theft, to wit:

> While acknowledging that he violated his agreement with the store by failing to return the equipment, appellant contends the evidence was insufficient to establish that he knowingly converted the equipment to his own use with fraudulent intent. **We agree.** The State established only that appellant rented equipment and failed to return it. It presented no evidence regarding what happened to the

> equipment and failed to show that appellant ***knowingly and with fraudulent intent appropriated it for his own use***.

Id. (emphasis supplied).

Similarly, in Tchorz v. State, 197 Ga. App. 185, 186 397 S.E.2d 619 (1990), the Georgia Court of Appeals reversed the conviction of an insurance agent for theft by conversion where he had admittedly received funds from a client, but no policy had ever issued, because his testimony was uncontroverted that he had forwarded the client's payment to the insurance company. The agent could not be guilty of theft because he testified that he properly paid the money to the company issuing the policy; so, while he breached his agreement with the client, he did not intend to convert the money to his own use, or to an unauthorized, use.

If, in Tchorz and Barrett, one without criminal intent cannot be convicted even where he has taken another's property and then either not returned it or not delivered the promised consideration, then, *a fortiori*, one cannot be prosecuted who not only lacks criminal intent, but also has used the property given over to her only for its intended purpose, and accounted for every dime of it when asked. In fact, it was Plaintiff's commitment to ensuring those funds were properly used for gymnastics competitions that ran her afoul of her employer's rules.

Defendants' point to a number of cases purportedly to support their position that violation of policy equals theft by conversion. Yet, none of Defendants' citations advance their argument. First, Defendants cite to Fisher v. Kentucky Fried Chicken, 175 Ga. App. 542, 545 (1985). Fisher concerned a fast food worker who, rather than deposit each day's cash receipts, was caught holding that money in the trunk of his car. 175 Ga. App. at 543. The employee had "twice lied by asserting that the money had been deposited." Id. Unlike the instant case, there was no well-known, legitimate reason for him to have the money in his trunk. His intention to steal the money was obvious. Unlike the defendant in Fisher, Armstrong was prosecuted not based on evidence that she was trying to steal money; but simply because she had processed the money, for its valid purposes, through the wrong account. Moreover, unlike the funds in Fisher, the funds that Plaintiff had in her possession ***were not her employer's funds***; rather, it was parent money that she had been entrusted with ***by the parents***. See Cr. Tr. 481:25-482:5, *supra;* Plaintiff's Third Amended Complaint at ¶ 69; Plaintiff's Second Amended Complaint at ¶¶ 19-23; see also Cr. Tr. 488:15-17, *supra* ("my parents were ok with it, and . . . they knew what they were getting…").

Even assuming that the funds with which she was entrusted *were* RFPRA's funds (which they were not), Fisher is not controlling as it is clear that upon being questioned about the alleged "missing" funds, Plaintiff turned over all funds in her possession and made a "proper accounting" of the moneys received and expended for team expenses. See Plaintiff's Third Amended Complaint at ¶ 69. This contrasts starkly to the employee in Fisher who "twice lied" about depositing the funds, and only deposited the funds over a week later, after an investigation had been initiated.

Next, Defendants' cite to a line of cases to support their proposition that even if Plaintiff had "misused" the funds only temporarily, if her intent was to use another's property without authorization, she had the requisite intent to commit the crime of theft. Defendants Brief at 21. Again, Plaintiff did not take RFPRA's money; it was parent money, and was not income to RFPRA. Therefore, her proper use of those funds for gymnastics-related expenses—ostensibly the exact same use to which RFPRA would have applied the funds had they been processed through their accounts—did no harm to the alleged "victim" here, RFPRA.

Once again, the cases cited by Defendants are radically distinct from the instant case. In each case cited by Defendants, the stolen property was indisputably the property of the complainant, and, most importantly, the criminal defendant in each case clearly appropriated the allegedly stolen property to their own use. Compare Lewis v. State, 287 Ga. App. 379, 651 S.E.2d

494 (2007)(manager convicted of theft by taking where he used company funds to pay for repair and towing of his personal vehicles, repairs to his mother's house, the purchase of home furnishings, his personal rent, and his stepson's tuition); Thornton v. State, 301 Ga. App. 784, 791-92, 689 S.E.2d 361, 367-68 (2009) (criminal defendant took possession of a truck from its' true owner promising to repair and then sell the truck, but the defendant kept the truck for over two years, never placed the truck for sale, drove it, and referred to it as "his" truck.); Tate v. Holloway, 231 Ga. App. 831, 834, 499 S.E.2d 72, 74 (1998) (employee took a company vehicle and refused to return the vehicle when the employer requested it back). Here, in contrast to these cases, there was absolutely no evidence that Armstrong used any parent money for her own purposes, or that she spent said money for anything other than its intended and authorized use.

Defendants' most desperate argument in support of their position that Armstrong deprived them of anything is their wholly speculative contention that RFPRA was deprived of some amount of interest due to the funds not being processed through their accounts. However, as Defendants' admit in their own brief, "[m]eet fees are not revenue for RFPRA. ***They should not make money on meet fees.*** *It should be going in* and going out." Defendant's Brief at p. 9, *citing* Cr. Tr. at 538:1-4. (some emphasis in original, ***bold italics*** added). There has never been any evidence, beyond speculation, that the funds would have been in an interest-bearing account, or that any interest was actually lost.

More importantly, there has never been any evidence that ***Armstrong*** earned interest on those funds, thereby "appropriating" that interest to her own use. Much of the money was kept in cash, and the remainder temporarily deposited into a non-interest bearing checking account. Moreover, depriving RFPRA of some speculative amount of interest would not constitute theft by conversion of that interest, because Armstrong would not be appropriating that interest to her own use, as required for the offense of theft by taking. See O.C.G.A. § 16-8-2, *supra* ("A person commits the offense of theft by taking when he unlawfully takes or, being in lawful possession thereof, **unlawfully appropriates any property of another with the intention of depriving him of the property**, regardless of the manner in which the property is taken or appropriated.")(emphasis supplied).

If anything, assuming RFPRA's "team expense" account bore interest, Armstrong would be like the Bible's "wicked servant" who buried the coins entrusted him by his master, instead of investing them and earning interest.[1] And, like the master in the Bible, while Garland was free to throw Armstrong into the "weeping and gnashing of teeth" of unemployment, he was not

[1] Matthew 25:23-30.

permitted to have her criminally prosecuted for her failure to earn interest on those funds.

b. *The denial of Armstrong's motion for directed verdict does not foreclose these claims*

Next, Defendants argue that the denial of Plaintiff's motion for directed verdict at her criminal trial "conclusively establishes that probable cause existed." This is not the case.

i. State law malicious prosecution claim

With respect to the state law malicious prosecution claim against Garland, and the entity-defendants upon whose behalf he was acting, the Complaint has alleged that the criminal prosecution, and the denial of directed verdict, resulted from fraudulent misrepresentation and withholding of exculpatory evidence. This Court has previously held that these allegations, if proven, would present evidence from which a trier of fact could determine there was a lack of probable cause. See Order [Doc. 43] at 16-20, 52-53. With respect to the state law claims for malicious prosecution, the existence of such fraud moots the effect of a denied motion for directed verdict under Georgia state law. Wolf Camera, Inc. v. Royter, 253 Ga. App. 254, 258-59, 558 S.E.2d 797, 801 (2002); see also Akins v. Warren, 258 Ga. 853, 854, 375 S.E.2d 605, 606 (1989); Davis v. Trusthouse Forte Hotels Worldwide, Inc., 195 Ga. App. 768, 395 S.E.2d 235 (1990). Here, as this Court has already ruled, at least as to Garland, Plaintiff has clearly pled facts sufficient to allege that "Defendant Garland intentionally, recklessly, and maliciously instituted Plaintiff's prosecution without probable cause, and that Defendant Garland gave false information and testimony during the investigation and prosecution of Plaintiff's criminal case." July 1, 2013 Order (Doc. 43) at p. 58 (*citing* Plaintiff's Second Amended Complaint at ¶¶ 23-25, 27-31, 52-55.).

To the extent that Defendants assert that Arrington would have made the decision to arrest even in the absence of Garland's fraudulent misrepresentations, the question of causation is still one for the jury. Where an individual influences an officer's decision to make an arrest through incomplete or false information, said individual is not insulated from liability simply due to the fact that the officer testifies that he acted according to his independent judgment. Turnage v. Kasper, 307 Ga. App. 172, 181, 704 S.E.2d 842, 851-52 (2010). As the Turnage court held:

> The fact that the arresting officer testified at trial that the decision to pursue a charge of aggravated stalking against Kasper was made in his individual judgment does not change this result. The officer was operating based upon the photographic and audio evidence provided by Penton in conjunction with Turnage's "very strong[ ]" assertion that it showed Kasper to have committed the crime of aggravated stalking, both of which were misleading when taken out of the contextual reality [. . .]

ii. federal 1983 claim

With respect to the federal Section 1983 claim, the proper inquiry is whether the state court's denial of a directed verdict to Armstrong in the criminal trial creates collateral estoppel as to the issue of probable cause for the instant suit. This issue is governed by Farred v. Hicks, 915 F.2d 1530, 1533-34 (11th Cir. 1990), where the Eleventh Circuit addressed "Georgia's unsettled law regarding the preclusive effect of state criminal actions upon subsequent civil actions." In Farred, the plaintiff was arrested, tried, and acquitted on charges of burglary. Id. at 1531. At his criminal trial, he had made a motion to suppress the evidence that was used to arrest him, arguing that the evidence did not present probable cause for such arrest. Id. The state criminal trial court had denied the motion, finding there was in fact sufficient probable cause. Id.

The plaintiff subsequently brought a federal Section 1983/Fourth Amendment action against the arresting officers, based on the claim that he had been arrested and prosecuted without probable cause. Id. The district court granted a motion to dismiss that was eerily similar to that sought by the instant motion—citing the suppression hearing, the district court found that the state trial court's finding of probable cause precluded the plaintiff from litigating the probable cause issue in his federal Section 1983 Fourth Amendment action. Id. at 1532.

The Eleventh Circuit reversed. The Court held that the preclusive effect, if any, of the state trial court's probable cause ruling was governed by Georgia law on collateral estoppel. Id. at 1533, citing Webb v. Ethridge, 849 F.2d 546, 549 (11th

Cir.1988). The Court held that Eleventh Circuit precedent interprets Georgia collateral estoppel law to require "mutuality" between the parties to a previous proceeding, before a ruling in that proceeding has preclusive effect in a later proceeding. Id. at 1533-34. Because the defendants to the federal civil proceeding—the two arresting officers—were not parties to the state criminal proceeding—to whom the plaintiff and the State of Georgia were the only parties—there was no "mutuality." Id. at 1534. Therefore, "the district court erred when it concluded that the doctrine of collateral estoppel barred [plaintiff] from litigating his claims in federal court." Id. see also Pair v. Wilson, 5:05CV137/SPM/MD, 2007 WL 2565982 (N.D. Fla. July 27, 2007) (officer-defendant was not party to state criminal proceeding, so no collateral estoppel, and "the court must engage in an independent review of the record with respect to the constitutionality of this defendant's actions); Skunda v. Pennsylvania State Police, 47 F. App'x 69, 71 (3d Cir. 2002) ("offensive collateral estoppel does not preclude [party] from re-litigating the issue of probable cause in this civil action because of lack of privity between him in this civil action and the parties involved in the prior criminal action").

In addition to there being no privity among the parties to the criminal action, there is no collateral estoppel because the issues germane to Armstrong's civil claims were not fully and fairly litigated in the state criminal trial. "In federal actions, including § 1983 actions, a state-court judgment will not be given collateral estoppel effect…where the party against whom an earlier court decision is asserted did not have a full and fair opportunity to litigate the claim or issue decided by the first court." Haring v. Prosise, 462 U.S. 306, 313, 103 S. Ct. 2368, 2373, 76 L. Ed. 2d 595 (1983)(emphasis supplied). See also Webb, 849 F.2d at 549(Collateral estoppel in Georgia applies only to those matters "which are shown to be actually litigated and determined" by the criminal court). Therefore, where the specific issue of probable cause is not litigated in the criminal trial, there is no collateral estoppel as to that issue in a subsequent civil case brought under the Fourth Amendment. See Webb at 549 ("Our examination of the . . . transcript . . . does not permit us to conclude that the issue of probable cause was 'actually litigated and determined.' The transcript gives no hint that the issue of probable cause was mentioned by either party . . .).

Indeed, the issue on directed verdict is wholly distinct from the question of whether probable cause for arrest existed. See Ware v. United States, 971 F. Supp. 1442, 1467-68 (M.D. Fla. 1997) ("a motion for a judgment of acquittal does not present the issue of lack of probable cause, [because]…unlike a magistrate judge's objective and impartial review of the evidence in an adversarial probable cause hearing, the criminal trial judge must view the evidence in a light most favorable to the prosecution."); see also Lee v. State, 247 Ga. 411, 412, 276 S.E.2d

590, 592 (1981) ("A trial court must grant a motion for directed verdict unless, **viewing the evidence in the light most favorable to the prosecution**, a rational trier of fact could find the essential elements of the crime beyond a reasonable doubt.") (emphasis supplied). Because the standard for a directed verdict is far more deferential to the prosecution, and because such a motion is, very plainly, not an opportunity to fully and fairly litigate the issue of probable cause, the trial court's denial of Armstrong's motion for directed verdict has no preclusive effect with response to the probable cause issue in her federal civil rights claim.

Indeed, the record reveals that the judge in the criminal trial did not address the issue of probable cause on the motion for directed verdict, nor the specific arguments being considered here. Here, for example, the issue of whether disobedience of one's employer's instructions for the deposit of funds constituted theft was never presented to, or litigated at, the trial court. Further, the question of whether Garland's false statements and concealment of exculpatory evidence negated probable cause was never presented to, or litigated at, the trial court.

Though the criminal defense attorney briefly referenced the issue of Armstrong's lack of criminal intent, he only cited to two factually distinct criminal embezzlement cases in support of his motion. These cases discussed "joint control or joint access," and not intent. Cr. Tr. at 445:4-10, 448:8-10. Not surprisingly, the Court did not find those cases controlling. Id. Accordingly, there has been no finding as to the issues before this court. Therefore; no estoppel could be construed therefrom.

Notably, Defendants misconstrue the criminal trial judge's order on Plaintiff's motion for directed verdict at her criminal trial, stating "the trial court found that there was no dispute that Plaintiff was holding 'some $4,000.00' **of the RFPRA's money**, and that '[t]he only question is: Was it withheld with an unlawful intent." Defendant's Brief at p. 12; 25 (emphasis supplied). However, the judge made no such finding that the funds she held was "RFPRA's money," as Defendants misleadingly assert. The actual quote is: "there has been no evidence at all to dispute that this lady had at least the four thousand some odd dollars, so there's not --that's not a who done it." Cr. Tr. 448:19-21. There was no finding whatsoever that the funds belonged to RFPRA.

Finally, the basic premise that the state tribunal's directed verdict ruling would preclude a federal court from determining that a prosecution was unconstitutional is offensive to our structure of government. The Supreme Court has long recognized an "understanding of § 1983 that the federal courts could step in where the state courts were unable or unwilling to protect federal rights [because]…42 U.S.C. § 1988 authorizes federal courts, in an action under § 1983, to disregard an otherwise applicable state rule of law if the state law is inconsistent with the federal policy underlying § 1983." Haring, *supra* 462 U.S. at 313-14 (internal citations and quotations omitted). Indeed, following the Defendants' contention to its' logical conclusion, a foundational purpose of the federal courts—to guard the federal constitution against errors and abuses by lower tribunal—would be extinguished. If a state tribunal's determination as to probable cause, or even to guilt or innocence, was binding on a federal court, innocent people who were wrongly prosecuted, but then acquitted, in state court, would be deprived of relief in the federal courts. We know that is not the intention of the Supreme Court, who has held that Section 1983 may be used even to remedy a wrongful conviction that is later overturned See Heck v. Humphrey, 512 U.S. 477, 486-87, 114 S. Ct. 2364, 2372 (1994) ("a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254.") see also Steidl v. Fermon, 494 F.3d 623 (7th Cir. 2007)(Allowing Plaintiff's § 1983 malicious prosecution suit alleging that police officers violated his due process rights by knowingly concealing evidence of his innocence, where Plaintiff had been convicted of a double murder, served seventeen years, and was finally released pursuant to a writ of habeas corpus).

If the denial of a criminal defendant's motion for directed verdict prohibited her from challenging the constitutionality of her prosecution, then certainly a conviction would; but we know that is not the case, because the Supreme Court contemplates § 1983 actions where individuals have been convicted and then released either on appeal or through habeas corpus.[2]

3. *Plaintiff agrees her malicious prosecution was limited to her arrest pursuant to warrant; however for purposes of damages all of the events that flowed from her arrest are appropriate for consideration*

Plaintiff does not dispute these Defendants contention that she was "seized" for purposes of the Fourth Amendment when she was arrested pursuant to a warrant by Detective Arrington. As she was released, post-arrest, with minimal post-release conditions, her unconstitutional seizure did not "continue" after her release. Nevertheless, particularly when considering the calculation of damages, as Plaintiff was ultimately indicted and prosecuted following her seizure, this Court may consider the *injuries* she suffered from the time of her unlawful seizure up through her prosecution and ultimate acquittal.

---

[2] Plaintiff recognizes the two unpublished decisions from the Middle District of Georgia, in which the court applied Monroe v. Sigler, 256 Ga. 759, 761 (1987) to bar a federal malicious prosecution claim where the state criminal court had denied a motion for directed verdict. Plaintiff respectfully submits that these cases are out of step with clearly-established Eleventh Circuit law regarding the application of collateral estoppel in this context. Moreover, even were this Court to follow the decisions of these cases, Armstrong's federal claims would still proceed on the exception to Monroe in which probable cause is elicited through fraudulent misrepresentation. See Wolf Camera, Inc. v. Royter, 253 Ga. App. 254, 258-59, 558 S.E.2d 797, 801 (2002)

"When the seizure is part of the institution of a prosecution…injuries caused by the unlawful seizure may include those associated with the prosecution". Whiting v. Traylor, 85 F.3d 581, 586 (11th Cir. 1996).

4. *Arrington is not entitled to official immunity*

With respect to Defendants' contention that Arrington is entitled to official immunity on Armstrong's state law claims, the only argument made by Defendants is that Armstrong has not alleged that Arrington acted "with actual malice towards Plaintiff or purely with an intent to injure to Plaintiff [*sic*]…." This is just plainly incorrect. As discussed at III(C)(1) and III(C)(2), *supra* and throughout Plaintiff's Complaint, Plaintiff has sufficiently pled facts evidencing that Arrington acted with the total want of probable cause, thus he acted with legal malice and the intent to injure Plaintiff.

5. *Arrington is not entitled to qualified immunity*

Defendants contend that Arrington is entitled to qualified immunity for the violation of Plaintiff's Fourth Amendment rights. While they properly state the two-part test for determining his entitlement to qualified immunity; they completely fail to provide anything in the way of legal analysis tending to prove this contention. In fact, Defendants' brief on this point consists of nothing more than a recitation of various cases explaining this circuit's two-part qualified immunity test. Defendants then concede that Plaintiff satisfies prong one of the two-part test, but assert in wholly conclusory fashion "Plaintiff cannot satisfy **part two** of the test and Det. Arrington is, therefore, protected by qualified immunity." Defendants' Brief at p. 34(emphasis supplied).

For purposes of this response, Plaintiff concedes that Arrington's actions seem to have been discretionary in nature. Defendants have conceded that Plaintiff has satisfied part one of this circuit's two-part test. That is, whether or not "plaintiff's allegations, if true, establish a constitutional violation." Defendant's Brief at p. 32, *citing*, Al-Amin v. Smith, 511 F.3d 1317, 1324 (11th Cir. 2008). Therefore, Plaintiff gladly accepts the burden of demonstrating she also satisfies part two of the test, specifically, that her Fourth Amendment Rights are clearly established under federal law. Suissa v. Fulton County, 74 F.3d 266, 269 (11th Cir. 1996) (citation omitted); see also Saucier v. Katz, 533 U.S. 194, 201, 121 S.Ct. 2151 150 L.Ed.2d 272 (2001) (same). To the extent Defendant argues that Plaintiff's right under the Fourth Amendment to be free from an unreasonable seizure are not "clearly established," the absurdity of that contention speaks for itself.

a. Plaintiff's rights are clearly established

"There is **no question** that an arrest without probable cause to believe a crime has been committed violates the Fourth Amendment." Madiwale v. Savaiko, 117 F.3d 1321, 1324 (11th Cir.1997)(emphasis supplied). Quite plainly, Arrington had fair warning that his alleged treatment of Plaintiff was unconstitutional. Bates v. Harvey, 518 F.3d 1233, 1247-48 (11th Cir. 2008) (In determining whether the unlawfulness of the official's act was apparent, the Court must ask "whether the state of the law at the time [of the official's action] gave [the official] 'fair warning' that [his or her] conduct was unconstitutional.").

The Eleventh Circuit has explained that a defendant may receive "fair warning" in one of three ways. Vinyard v. Wilson, 311 F.3d 1340, 1350 (11th Cir. 2002). "First, conduct may be clearly established as illegal through explicit statutory or constitutional statements." Griffin Indus., Inc. v. Irvin, 496 F.3d 1189,1208-09 (11th Cir. 2007) (citing Vinyard, *supra,* at 1350). "Second, certain 'authoritative judicial decision[s]' may establish broad principles of law that are clearly applicable in a variety of factual contexts going beyond the particular circumstances of the decision that establishes the principle." Id. at 1209 (alteration in original) (citing Vinyard, *supra,* at 1351). "Third… is the situation where case law previously elucidated in materially similar factual circumstances clearly establishes that the conduct is unlawful." Id. (citing Vinyard, *supra*, at 1351-52).

Therefore, even if the cases discussed above and throughout this Response are not considered to be fundamentally similar, Arrington had "fair warning" that Plaintiff had a fundamental, Fourth Amendment right to be free from an unreasonable seizure in the form of an arrest without reasonable probable cause to believe a crime had been committed. Again, it was simply not a crime for Armstrong to violate her employer's rules, and Arrington's assertion that he arrested Armstrong for "not doing like she was told" by Armstrong illuminates that he should have known she had committed no crime. (Cr. Tr. at 432:5).

As Plaintiff has alleged in her Third Amended Complaint, and in this response *supra*, Arrington did not have probable cause to believe that she had committed a crime at the time he arrested her; therefore his actions violated clearly established law. Accordingly, he is not entitled to qualified immunity.

b. There was no probable cause for Plaintiff's arrest

As demonstrated throughout this response, particularly in III(C)(1) and III(C)(2) hereinabove, throughout Plaintiff's Third Amended Complaint, and upon review of Arrington and Plaintiff's testimony at her criminal trial, under the elements of the crimes for which Plaintiff was arrested it is clear that under the instant factual circumstances Detective Arrington simply could not have had reasonable probable cause to arrest Plaintiff.

IV. CONCLUSION

For these reasons, Armstrong respectfully submits that this Court must DENY in full these Defendants' Motion.

Respectfully submitted this 11th day of November, 2013.

/s/ James Radford
James Radford
Georgia Bar No. 108007
Caleb Gross
Georgia Bar No. 960323

James Radford, LLC
545 N. McDonough St., Suite 212
Decatur, Georgia 30030
(678) 369-3609
james@jamesradford.com
caleb@jamesradford.com

/s/ Joseph Weeks
Joseph Weeks
Georgia Bar No. 912341

McNally, Weeks & Sakas
150 E. Ponce de Leon Ave, Suite 260
Decatur, Georgia 30030
(404) 373-3131
jweeks@mcnallyweeks.com

Local Rule 7.1D Certification

By signature below, counsel certifies that the foregoing document was prepared in Book Antiqua, 13-point font in compliance with Local Rule 5.1B.

Certificate of Service

The undersigned certifies the foregoing document was electronically filed on November 11, 2013 with the Clerk of Court using the CM/ECF system, which will automatically send e-mail notification of such filing to the following attorneys of record:

/s/ James Radford
James Radford
Georgia Bar No. 108007

Counsel for Plaintiff